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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1204

FRASER & JOHNSTON COMPANY, a corporation,
Petitioner,

vs.

LODGE 1327,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO,
Respondent.

Reply of Petitioner

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BORG PRINTING COMPANY OF CALIFORNIA, 340 FIRST STREET, SAN FRANCISCO 94105

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Reply of Petitioner

Petitioner, FRASER & JOHNSTON COMPANY, submits the following in reply to respondent's opposition and as a supplement to its petition and respectfully prays that the petition be granted.

I.

THE PRE-EMPTION QUESTION

Respondent attempts to meet the argument that arbitration after the National Labor Relations Board has already decided the issues to be placed before the arbitrator will almost inevitably result in incompatible or conflicting adjudications for which there are no means of reconciliation by suggesting that "[a]n arbitrator knowledgeable in labor relations matters will pay due deference to the Board's decision, and if he fails to do so a court may decline to enforce the award." (Brief of respondent, p. 4) However, as pointed out in the petition (p. 8 particularly in note 2), court confirmation of an arbitral award is mandatory absent fraud, corruption, partiality, misconduct, misbehavior, or an act in excess of the arbitrator's powers. Thus, petitioner's arguments have not, in any way, been met.

Since the petition herein was filed, a decision by the Appellate Division of the New York Supreme Court was reported in 328 N.Y.S. 2d 939—*Borden, Inc. v. Local 50, Bakery Workers* (Feb. 18, 1972). There the court affirmed an order denying a motion to stay arbitration pending the determination of a federal court action for a declaration that the dispute in issue was not subject to arbitration but was a matter within the exclusive jurisdiction of the National Labor Relations Board. The court affirmed because the request for a stay was premature.

> "Until the 'moment of conflict' between the arbitral process and an N.L.R.B. determination arrives, by virtue of N.L.R.B.'s invocation of its paramount authority by force of its pre-emption of the field of dispute, there can be no valid basis for granting the requested stay (see Matter of Meyers [Kinney Motors], 32 A. D. 2d 266, 72 LRRM 2064). In the instant case, the request is premature."

In petitioner's case, the "moment of conflict" has arrived. The Board has not only asserted its paramount authority by force of its pre-emption of the field, but under that authority has acted. The New York Appellate Court indicates that in such a situation, it would stay arbitration.

This most recent case not only recognizes the preeminence of the National Labor Relations Board, but also is clear evidence of the conflict between and among the federal and state courts in this very important and critical matter. Review by this Court is the only means by which this matter can be given the definition and clarity that it deserves.

II.

THE DEFENSE OF LACHES

Respondent notes that the Court below opined that the issue of laches was not raised in the trial court. However, the record will show that the issue was raised by petitioner and argued in its memorandum in opposition to respondent's motion for summary judgment. On pages 7-9 of petitioner's memorandum of

points and authorities in opposition to motion for summary judgment (Record pp. 261-63) it stated,

> "As set forth in the affidavit of Tom A. Leen, the alleged grievance was never taken up with [petitioner] as required by Article XI of the collective bargaining agreement under which [respondent] seeks to compel arbitration. None of the steps in the grievance procedure as specified in said Article XI ([respondent's] Exhibit "A" to Leen's affidavit) preceding the arbitration provision were pursued or undertaken by [respondent]. Assuming, *arguendo,* that said collective bargaining agreement is in force, [respondent] being a party to it and relying on it, must first comply with the grievance steps before it can seek arbitration."
>
> ***
>
> [Respondent], as set forth in Leen's affidavit, has not complied with the grievance steps in the contract (Art. XI). Having failed to so comply, it is not in a position to pursue arbitration."

Thus, the court below and respondent were in error, the issue of laches was before the trial court and the decision of the court below does indeed pose the same question as was posed in the case of *International Union of Operating Engineers, Local 150, AFL-CIO, Petitioner v. Flair Builders, Inc., Respondent,* No. 71-41. Certiorari was granted in that action on December 7, 1971. The instant case poses exactly the same issue and should similarly be entitled to review by this Court.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Dated:

Respectfully submitted,

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